No. 309.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

WILLIAM H. DANFORTH, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONER.

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OPINIONS BELOW.

The District Court decision is not reported. The first opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. pp. 221-229) is reported in 102 Fed. (2nd) 5. The second opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. pp. 238-239) is reported in 105 Fed. (2nd) 318.

JURISDICTION.

The statutory provisions upon which the jurisdiction of this Court rests is Section 240 (a) of the Judicial Code, as amended February 13, 1925, Chapter 229, 43 Stat. 938, Sec. 1217, U. S. Compiled Accum. Supp. 1925, 28 U. S. C. A. 347.

The date of the judgment to be reviewed is July 11, 1939.

QUESTIONS INVOLVED.

The two questions involved are:

1.

Did the Government "**appropriate** or **take**" an easement in the land in question within the meaning of the Fifth Amendment, either

a) When it started to work on the set-back levee on October 21, 1929, or

b) On October 31, 1932, when the set-back levee was completed, or

c) When Congress passed the Flood Control Act May 15, 1928 (33 U. S. C. A., par. 702a, et seq.), and adopted a plan of flood control, which involves an intentional, additional, occasional flooding of complainant's land as soon as the Government began to carry out the project authorized?

2.

Does the rule of law announced by this Court in a number of cases to the effect that when the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter, apply only as held by the Court of Appeals to admiralty cases (R. p. 227), or does the rule apply also to law cases?

a. Can the United States repudiate an admittedly valid contract duly and lawfully entered into, fixing the value of an easement or the damages occasioned by the Floodway Act project, then bring condemnation proceedings and claim sovereign immunity when the said contract is asserted in the condemnation suit as the agreed measure of damages?

The facts showing jurisdiction are hereinafter set out under the heading **Statement** (p. 4). In the interest of brevity they are not repeated here.

The decision of the Court of Appeals holding that there has been no "taking" or "appropriation" is set out (R. p. 239). The first decision of the Court of Appeals holding that there **was** a "taking," but that the trial court had no jurisdiction to fix the amount of damages, in accordance with the contract of the parties, is set out (R. pp. 227, 228). The Floodway Act of May 15, 1928, which petitioner contends is violated by the opinion of the Court of Appeals is referred to (R. pp. 4-5), as set out in respondent's petition in condemnation. The applicable parts of the said Floodway Control Act are set out in the appendix.

The following decisions sustain the jurisdiction of this Court to review the decision of the Court of Appeals on the two questions involved, for the reasons set out in the specifications of error, hereinafter set forth.

A.

On question of "taking."

Hurley v. Kincaid, 285 U. S. 95;
Jacobs v. U. S., 290 U. S. 13;
U. S. v. Lynah, 188 U. S. 445;
Pumpelly v. Canal Co., 80 U. S. 166;
U. S. v. Cress, 243 U. S. 316;
U. S. et al. v. Kincaid, 49 Fed. (2nd) 768 (C. C. A. 5);

U. S. v. Yazoo etc. R. Co., 4 Fed. Supp. 366 (reversed on stipulation, 67 Fed. [2nd] 1019);
Sponenbarger v. U. S., 101 Fed. (2nd) 506 (C. C. A. 8) (now pending in this court on certiorari);
Franklin v. U. S., 101 Fed. (2nd) 459 (C. C. A. 6) (now pending before this Court on certiorari).

B.

On the question of the jurisdiction of the trial court to enter judgment or fix the damages as per contract of the parties.

Luckenbach Steamship Co. v. Norwegian Barque Thekla, 266 U. S. 328;
Bull v. U. S., 295 U. S. 247;
The Nuestra Senors de Regla, 108 U. S. 92;
The Paquete Habana, 189 U. S. 453;
U. S. v. Stephanidis et al., 41 Fed. (2nd) 958), aff. 47 Fed. (2nd) 554 (C. C. A. 2);
Wachovia Bank & Trust Co., Giaridan etc. v. United States (decided Aug. 26, 1938, by United States Circuit Court of Appeals, Fourth Circuit), 98 Fed. (2nd) 609 (C. C. A. 4);
U. S. v. Guaranty Trust Co. of N. Y., 91 Fed. (2nd) 898 (C. C. A. 2);
U. S. v. Nat. City Bank of N. Y., 83 Fed. (2nd) 236 (C. C. A. 2).

STATUTES INVOLVED.

The relevant portions of the statutes involved are set out in the Appendix, infra (pp. 55-59).

STATEMENT.

This is a suit brought by the United States to obtain an easement for flowage rights over the petitioner's farm, consisting of 1,033.56 acres in Mississippi County, Mis-

souri, pursuant to the Floodway Act of May 15, 1928 (R. p. 4).

The Government, pursuant to the said act, and as part of the project, had previously condemned and taken 105.34 acres extending along the whole western side of this farm (Exhibit A—heretofore attached to the petition for writ of certiorari, filed in this court August 23, 1939), and used the same as part of the inside or set-back levee (R. p. 237), which was built from Birds Point in a general southwestern direction to New Madrid.

This set-back levee was begun October 21, ~~1939~~ 1928, and was 98.9 per cent completed on October 31, 1932. For all practical purposes the set-back levee was completed on October 31, 1932 (R. p. 196). Since that time the only work done was to replace slides (R. p. 196).

We do not think it necessary to set out more than a very brief statement of the engineering testimony showing the purpose of the Floodway Act, but the same is set out in the testimony of the Government's engineer, T. T. Knappen (R. pp. 109-112), and the testimony of L. T. Berthe, an engineer who testified for the petitioner (R. pp. 189-193). At the time the record in this case was prepared there was serious doubt in the minds of both counsel for the petitioner and counsel for the Government as to whether any engineering testimony was essential to the issues on appeal, and the engineering testimony was very much abridged in the record for this reason.

In brief, it shows that under the Floodway Control Act in question a plan was devised by the Government engineers, which plan was adopted by Congress, whereby in times of excessive floods the water would be permitted to flow over the riverside levee along a place called the fuse plug and would leave the spillway area at the lower end of the project, but the water would be restrained from flowing west beyond a point where there is the set-back

levee (R. p. 110), and which follows a line extending from Birds Point in a generally southwesterly direction to a point on the west bank of St. John's Bayou across from New Madrid. The said riverside levee was constructed to an elevation varying from about 57 to 59 feet. At Cairo there is a gauge, which is a concrete slab on the river bank, with the elevation written on an iron plate in that slab, so that one can read the elevation of the water surface in terms of zero on that gauge. When one says that the riverside levee which follows the contour of the Mississippi River down to a point near New Madrid is between 57 and 59 feet, he means that the criterion is the Cairo gauge. In one of these it would be two feet higher than 55 feet, and the other 4 feet, so that the equivalent of 55 feet on the Cairo gauge means that a flood crest that reaches 55 feet at Cairo, as it follows down the river, is equivalent to 55, the height which that flood crest reaches as it passes on down the river, not necessarily the height of the water down below when it is 55 on the Cairo gauge, but the height the water would be on its course when the same maximum reached 55 feet at Cairo. From time to time the Riverside Levee has been increased in height up to the adoption of the Flood Control Act of 1928 (R. pp. 189-190).

The gauge is marked in feet and tenths, so that the surface of the water where it intercepts against the gauge gives the stage. It is located about two miles up the Ohio River from the mouth of the Ohio River. The gauge is separate from the height of the Riverside Levee, and the height of it is actually the height of the river above the ground surface, so that 55 feet on the Cairo gauge has nothing to do with the height of the Riverside Levee. It has to do with the height of the water along the Riverside Levee, or against it when the water stands at a given height on the gauge at Cairo as it passes. From an engi-

neer's point of view, it would be possible to construct a river levee that would protect the lands against floods, if Cairo were disregarded (R. p. 189). The levee could be raised to where it would protect up to 65 feet on the Cairo gauge and would be practical except for the fact that the City of Cairo would be inundated (R. p. 190). The levee, however, has not been raised or touched or maintained by the levee companies since 1927 or 1928 (R. p. 190). The **effect of the set-back levee**, which, as we have shown, was started in 1929 and completed in 1932, is to increase the depth velocity and duration of the overflow over and above what the depth and velocity and duration of the overflow would be without the set-back levee in there. If the set-back levee were absent, some of the water would pass to the west and some to the southwest (R. p. 190). In the flood of 1937 the depth of the water was increased by the set-back levee by five to six feet. The increase in depth and velocity of flow results in increased damage from wave action, primarily to buildings. With ordinary high water maintenance, none of the floods would have passed over the levee between 55 and 59 feet, except the flood of 1913 and the flood of 1937. With extraordinary maintenance, such as was put on the set-back levee in 1937, none of them would have overtopped except the flood of 1937. During the flood of 1937, because of the set-back levee, in restricting and preventing the flow of floodwaters to the west, there were additional flood waters diverted from the Mississippi and caused to flow over and across the petitioner's farm to an increased depth of about five or six feet. It was this increased depth, by reason of the set-back levee, that the Court of Appeals held was not an element of damage, and was not within the purview of the additional destructive waters that are set out in the Flood Control Act (R. p. 237). It would be possible to build the Riverside Levee up to 65 feet on the Cairo gauge, and then it would be possible to fill or raise the City of Cairo

(R. p. 191). There are several elements that govern the depth of the water. The accumulation of water is what is known as a reservoir. There is the element of a quantity of water to be passed through, the point of origin, the character of the cross-section, whether it is clear or timber, and the head at which it enters, the direction of flow (R. p. 192).

There is also a mean gulf level, by which term is meant so many feet above the mean sea level at Biloxi, Mississippi. Zero on the Cairo gauge is at elevation 270½ mean gulf level. The effective protection which the riverside levee affords is from 57 to 59½ feet (R. p. 110).

There is another element that is to be considered in connection with lands along the Mississippi River, which is very important in arriving at the element of damages, and that is the question of backwater or water that accumulates on the lands. Lands that are above 300 feet elevation are above the backwater territory and are not affected by the backwater (R. p. 111). The lands in question, as shown by the testimony of a Government engineer, G. W. Miller, shows that the tract consisting of 1,033.56 acres comprises all of Sections 22 and 27 lying east of the setback levee. Of this tract only 27.7 acres, or 2.8 per cent, lies below elevation 300. Of the whole tract 995.65 acres is above backwater, that is, above 300 feet elevation. The average elevation is 304.3 (R. p. 189).

By the project in question it was proposed to reduce the effect of the elevation of the upper eleven miles of the levee, with the exception of one mile at what is known as the Peafield Sewer, from its elevation, which was equivalent to 55 on the Cairo gauge. This was to be done by cutting the top of the levee off from 15 feet to a lower height of 12 or 13 feet. The same would be done for the lower five miles, for the purpose there of permitting any water above 55 to pass freely over the top of the levee at that end.

There was other engineering testimony (R. p. 189), showing that the actual height of the riverside levee varied from 10 to 20 feet, and at some places was as high as 25 feet.

The Floodway Control Act provides, among other things (Sec. 702D):

> "* * * When the owner of any land, easement or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price. * * *"

The act in question refers to the engineering plan submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1927, and printed in House Document No. 90, Seventieth Congress, First Session, and authorizes the project to be prosecuted under the **direction** of the **Secretary of War** and the supervision of the **Chief of Engineers.** Pursuant to authority under the act of **Section 1** of the same **the President** of the United States approved the Board provided for in the act, and reserved the right to make provisions for acquiring rights in land for constructing spillways and floodways. Accordingly, on December 11, 1928, he issued a presidential proclamation in connection with acquiring flowage rights, in which proclamation he provided for the purchase of flowage rights over the land within the floodway, between the existing riverside levee and the back (westward) levee, and in which he provided "that in no case shall the purchase price for the flowage on the land above the backwater area in the southern part of the floodway be more **than 66 per cent** of the present assessed valuation of this land" (R. p. 193): (Emphasis ours.) This proclamation is set out (R. pp. 193-194).

Pursuant to the said law and the said presidential proclamation, and **within the said 66 per cent** of the then

assessed value (R. p. 195), the Secretary of War, through military channels, offered the petitioner the sum of $31,681.98 for flowage rights over the above mentioned tract of land (R. p. 164). This was duly accepted by petitioner within the time authorized by the Government (R. p. 170, Exhibit K). Prior to the time that the said offer of $31,681.98 was made, the Government had had three appraisals made, one by the Department of Agriculture, one by army engineers, and one by local men (R. p. 160). Several months after the acceptance of the Government's offer by petitioner, the Government, through the same military officer, Major Brehon Somervell, wrote to petitioner withdrawing the said proposition (R. p. 185). The offer and acceptance were couched in the following language:

"War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan. 14, 1932

Subject: Offer of flowage rights, Bird's Point-New Madrid Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand

six hundred eighty-one and 98/100 Dollars ($31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

Brehon Somervell,
Major, Corps of Engineers,
District Engineer.

Incls.
Tract map;
General map of floodway;
Addressed return envelope.

Accepted: Wm. H. Danforth,
(Owner)
c/o Purina Mills,
St. Louis, Mo.
(Address)
March 2, 1932
(Date)."

Following its repudiation of the agreement fixing the damages, the Government filed a condemnation suit on September 25, 1933, for the flowage rights over the said tract of land (R. p. 4). The petitioner filed an answer and

counterclaim in said suit, setting out the written offer of the Government and the petitioner's acceptance of the same within the time authorized by the Government (R. p. 21). The said pleadings also denied the allegations in the Government's petition that the parties were unable to agree upon the amount of flowage damage (R. p. 22). The said pleadings also set out that the actual damages were in excess of $31,681.98, but that the said sum was accepted as a compromise and settlement, and that the parties had by contract fixed that sum for the flowage easements (R. p. 21). The counterclaim prayed for judgment against the Government in the sum of $31,681.98 with interest, and further prayed that the Court decree an easement in favor of the Government for the perpetual flowage easement (R. p. 25).

The allegations of the answer and counterclaim were conclusively proven through depositions taken of ex-Secretary of War, Patrick J. Hurley, Major-General Edward M. Markham, Chief of Engineers, and Major Brehon Somervell, the officer in charge at Memphis, who was ordered by the Secretary of War to make the offer aforesaid (R. pp. 116-128). Although the said answer and counterclaim were duly filed, by leave of Court (R. p. 20), upon motion of the Government, the Court struck the same out upon the theory that a counterclaim could not be filed in the case because, as the Court stated, the Government, even when acting through its appointed authorities, could not agree to limit the jurisdiction of the Court (R. p. 40), saying: "By telling this Court, in other words, that I shall be friendly when I have no authority to be friendly when the law in this case shows it is my duty to be unfriendly when I am passing on that motion to strike." (The reference is to the phraseology of the contract.)

At every step this petitioner claimed that the agreement in question fixing the damages or value of the flowage

rights was binding, and after the Court struck out the said answer and counterclaim, raised the same issue in exceptions filed to the viewers' report (R. pp. 57 and 68), and also filed a motion for judgment setting out the same facts set out in the answer and counterclaim (R. p. 41).

The Court ruled adversely to this petitioner, one District Judge ruling that an answer and counterclaim would not lie (R. p. 40), the successor holding that an answer should have been filed (R. p. 49), overlooking the fact that same had been stricken from the record by the first trial judge. The Court, over petitioner's objection and exceptions, appointed viewers, and affirmed an award of $17,921.70, after overruling the motion of the petitioner for judgment in the sum of $31,681.98 (R. p. 78).

Neither of the said trial judges gave any reason for refusing to enforce the contract in question, filed no opinions regarding the same, simply denied the petitioner, Danforth, the relief requested in the various forms as set out above to enforce the contract in question.

So that the petitioner raised the issue that he was entitled to recover the sum of $31,681.98 and interest, in three different ways: First, by pleading the answer and counterclaim; second, by filing exceptions, raising the same issue, and, third, by filing motions to set aside the awards and for judgment. As we have set out above, the Court struck out the answer and counterclaim, held that the issue could not be raised in exceptions, and overruled the motion to set aside the award and judgment and to enter up a judgment for the said sum and interest, to all of which the petitioner duly excepted.

The record shows that in those cases where the Government desired to carry out similar offers which were made to the landowners, they appeared before the Court and entered up judgments (R. p. 187) in accordance with the identical terms, of similar offers as that shown in the case at bar (R. p. 43).

Lieutenant-Colonel Eugene Reybold of the Corps of Engineers, U. S. Army, stationed at Memphis, Tennessee, had charge of the district in question in January, 1937. At that time he issued instructions to dynamite the levee during a flood in January of 1937, or as the Colonel testified, "he placed the Birds Point-New Madrid Floodway in operation" (R. p. 199). Major R. D. Burdick also testified that he was authorized and directed to open the fuse plug section of the levee to place the said project in operation in January, 1937 (R. p. 201).

The evidence showed that just prior to the time of the Floodway Act in 1928 the Northwestern Mutual Life Insurance Company was lending money on a basis of $50.00 an acre in the area where this land was located; that they did not make any loans since the Floodway Act went into effect in areas within the spillway, although they had applications for them (R. p. 187).

Deeds of trust aggregating $48,000 on the property in question were paid off in full to the Northwestern Mutual Life Insurance Company prior to the last hearing in the trial court, so that petitioner is the only one who has any interest in the land (R. p. 89).

The trial court refused to allow **interest** on the said award of $17,921.70, holding that there has been no "taking."

This case was argued twice before the Court of Appeals. In the first opinion of March 4, 1939, reported 102 Fed. (2nd) 5, the Court of Appeals modified the judgment of the trial court to the extent of holding that there was a "**taking**" as of October 21, 1929, and allowed interest as of that date, but held that while the contract between the Government and this petitioner fixing the damages was **valid** and **binding** and could be enforced by the Government, it could not be enforced by the landowner in the District Court in the suit at bar (R. pp. 224-225). On motion for **rehearing**, filed by the **Government**, the Court of Ap-

peals set aside the judgment which it had entered, and set the case down for rehearing on May 12, 1939, **limiting the argument** only to the question of **when** there was a **taking** (R. p. 232). Under date of July 11, 1939, the Court of Appeals affirmed the judgment of the trial court, reversing itself on the question "of taking," and holding that the property in question has not yet been taken (105 Fed. [2nd] 318), although the same court, under date of February 8, 1939, in the case of **Sponenbarger et al. v. United States,** 101 Fed. (2nd) 506, a suit coming up from the District Court for the Eastern District of Arkansas under the same Act of May 15, 1928, under similar facts, held that there **was** a "taking." This Court has recently granted certiorari in the Sponenbarger case. There is also now pending before this Court on certiorari the case of **Franklin et al. v. United States,** 101 Fed. (2nd) 459, involving the question of a **"taking"** and arising under the same Flood Control Act of May 15, 1928, coming up from the Sixth Circuit. In the Franklin case the Court of Appeals for the Sixth Circuit held there was no taking or appropriation, with Circuit Judge Hamilton dissenting.

SPECIFICATIONS OF ERRORS TO BE URGED.

I.

On Question of Taking.

The Circuit Court of Appeals for the Eighth Circuit erred in the following particulars, to wit:

(1) In holding that the building of the set-back levee was only one essential element in the Jadwin Plan, and that there can be no taking until the height of the upper fuse plug section is reduced about three feet for a distance of eleven miles below Bird's Point, Missouri, and for a distance of about five miles from New Madrid, Missouri (R. p. 236).

(2) In holding that petitioner still enjoys the same use of his land that he always has, although the Government has condemned and taken possession of 105.34 acres along the western part of the farm in question as part of the set-back levee pursuant to the said Floodway Act, and in holding that increasing the depth of water over appellant's land artificially through the building of the set-back levee does not increase the damage to plaintiff's property (R. pp. 237-238).

(3) In holding that the increased depth of water to which appellant's lands are subjected are not the "additional destructive flood waters" referred to in the Act of May 15, 1928, and erred in holding that the increased depth of the water is an incidental consequence for which the Government cannot be held liable (R. p. 237).

(4) In holding that the military officers in charge of the floodway area had no authority to dynamite the existing river levee prior to the completion of the fuse plug section (R. p. 238).

(5) In holding that there is nothing in the Flood Control Act to prevent the raising of the levees by the existing local levee district prior to the construction of the fuse plug sections (R. p. 239).

(6) In holding that the Government had not assumed dominion over the river side levee, although after the flood of 1937 the Government first ordered it to be rebuilt to fifty-five feet and then changed the plan and ordered it built to fifty-eight feet (R. pp. 200, 239).

(7) In holding (R. p. 239) that "appellant's land will not be taken within the meaning of the Act until the upper fuse plug in the riverside levee shall be opened and the land is exposed to 'additional destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River.'"

II.

On Question of Jurisdiction of the Trial Court to Enforce Contract or Enter Judgment.

(8) In holding that the District Court had no jurisdiction to hear petitioner's claim or to enter a judgment in the condemnation proceeding upon an admittedly valid contract fixing the extent of the damages for the flowage rights then being taken by court proceedings.

(9) In holding that the rule announced by the Supreme Court to the effect that when the United States comes into court to enforce a claim, it comes not as a sovereign, but as a suitor, and thereby submits to the Court's jurisdiction of just claims relating to the subject matter involved, even to the extent of becoming subject to an affirmative judgment, **is limited** to suits in **admiralty**.

(10) In holding that there is a difference between suits brought by the United States in condemnation proceedings and in other proceedings so far as the character in which the Government brings the suit.

(11) In holding that there is a difference between asserting a claim in opposition to a money demand brought by the Government and to a demand brought by the Government for flowage rights over plaintiff's property.

SUMMARY OF ARGUMENT.

A.

QUESTION OF TAKING.

The petitioner claims that there was a "taking" or "appropriation," either when the set-back levee was started October 21, 1929, or at any rate when it was completed October 31, 1932, or when Congress passed the Flood Control Act on May 15, 1928, and adopted a definite plan of Flood control.

The decision of the Court of Appeals violates the Flood Control Act itself (which is set out in the Appendix, p. 55), particularly sections 3 and 4, providing for procedure on the part of the United States to acquire flowage rights and providing for the purchase of such flowage rights by the Secretary of War, when in his opinion he deems the price reasonable. The decisions supporting the petitioner's contention that there was a taking or appropriation are set out herein under the heading of **Jurisdiction** on the question of taking (p. 4). The opinion in the case at bar is in direct conflict with the said cases cited under subdivision A.

The Government admitted in the Court of Appeals, and we are confident the Government will also admit in this Court, that the petitioner is entitled to interest from the time of taking. It is only the time of taking that the Government disputes. The cases relied on by the Government to support its position that there has been no taking are without application. Assuming that most or all of such cases will be the ones heretofore relied on by the Government, we shall briefly discuss some of them in the main argument to show their inapplicability.

B.

ON THE QUESTION OF THE JURISDICTION OF THE TRIAL COURT TO HEAR THE CLAIM OR ENTER JUDGMENT FOR THE AMOUNT AGREED UPON BY THE GOVERNMENT AND THIS PETITIONER AS THE EXTENT OF DAMAGES OR AS THE VALUE OF THE FLOWAGE RIGHTS.

1.

When the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.

U. S. v. The Thekla, 266 U. S. 328, l. c. 339.

2.

The Government and the landowner had a right to agree upon compensation for the flowage rights or the damages, and the contract duly entered into by the petitioner and the United States of America, through its duly authorized agent, is valid and binding. Indeed, it is authorized by the Flood Control Act of May 15, 1928, and is recognized as valid and binding by the Court of Appeals in its opinion (R. p. 224), where the Court says:

> **"In this appeal the appellant continues to urge that he was entitled to have his damages determined under the prior agreement with the Government and that the lower court was in error in appointing commissioners to make an assessment based upon actual values. On its part the Government admits that a valid and binding contract to purchase the flowage easement involved for $31,681.98 was entered into with the appellant and subsequently repudiated. It contends, however, that sovereign immunity from suit de-**

prived the trial court of jurisdiction to render an affirmative judgment on a contract claim of this amount."

The Government, in its brief filed in the Court of Appeals, admitted the validity of the contract, saying:

> "It may be true that to attain complete justice in one proceeding the appellant should be allowed in the District Court recovery on the contract to which he may be entitled, especially since the United States could, had it chosen to do so, have enforced it in that forum against him. But, however desirable this might be, the statutes which alone can confer jurisdiction over suits against the United States and the decisions thereunder plainly show that the court below had no jurisdiction of appellant's claim."

The Government further said in its brief (p. 26):

> "The Government, as in the Wachovia Bank case, may plead the contract, in which case all parties thereto are bound, or it may take the property on payment of just compensation, in which case the contract may not be asserted in the condemnation proceedings as a basis for recovery against the Government. • • •
>
> "If this entails hardship, it is a hardship incidental to contractual relations with the Government."

The case of Wachovia Bank & Trust Co., Guardian, etc., v. U. S., 98 Fed. (2nd) 609, decided August 26, 1928, by the United States Court of Appeals for the Fourth Circuit, also upholds this petitioner's contention that the contract in question is enforceable against the United States in this proceeding.

3.

The Court erred in striking out the answer and counterclaim.

The striking out of the same was not merely procedural

It involved a substantial right. Fuller v. Claflin, 93 U. S. 14; In re Gloria, 286 Fed. 188. And the Court of Appeals, in upholding the action of the trial court and in holding that the trial court had no jurisdiction to hear the claim or to enter a judgment in accordance with the contract of the parties, violated the principle of law repeatedly declared by this Court to the effect that when the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done in regard to the subject matter. This Court has never held, as contended by the Court of Appeals in its opinion, that this rule of law is limited to admiralty cases. A condemnation suit is a law case, and the rule contended for is applicable (Chappell v. U. S., 160 U. S. 499, l. c. 513). Therefore, when the United States brought the suit in question the petitioner had a legal right to assert the contract in question and the Court should have recognized the contract and entered up a judgment in accordance with the terms which involved the same subject matter and grew out of the same transaction, namely, the acquiring of the flowage rights over the land in question. The cases upholding this rule will be discussed under the argument.

ARGUMENT.

A.

QUESTION OF TAKING.

Petitioner claims that there was a "taking" or "appropriation," either when the set-back levee was started October 21, 1929, or at any rate when it was completed October 31, 1932, or when Congress passed the Flood Control Act on May 15, 1928, and adopted a definite plan of flood control.

The record shows that the set-back levee was started by the Government on October 21, 1929. It was 98.9 per cent completed on October 31, 1932 (R. p. 195). There was a gap to close at a town called Samos, because the Government had not acquired a right of way where the Missouri Pacific crosses that levee.

The only work that was done since October 31, 1932, was the replacement of slides and repair operations (R. p. 196). Certainly when the United States exercised dominion over the property of the defendant there was a taking within the meaning of the Constitution. We have always felt, and we now feel, that if there was not a taking when Congress enacted the legislation and provided for a definite plan of Flood Control, there was certainly a taking when the work was commenced on October 21, 1929, and interest should be chargeable as of that time. This was the first holding of the Court of Appeals (R. p. 229). The Court of Appeals for the Eighth Circuit, in the case of Sponenbarger v. U. S., 101 Fed. (2nd) 506, in construing the Floodway Control Act of May 15, 1928, held:

> 1. "Without question, in the passage of this Act, Congress has assumed control of this fuse plug, and, by

entering a field within its jurisdiction, has excluded all local interference with its national powers. * * * In fact, the frankly stated object of the Jadwin plan is to protect more than two-thirds of the valley at the expense of potential damage to property in the floodways in the event of excessive floods. Such discrimination is wanting in the absence of government control of levees, and in the existence of local responsibility for levee or other flood protection."

2. That the Floodway Act was one plan and when the Government began to carry it out that there was a taking.

3. That by the provisions of the plan the flood control is subjected to a planned and practically certain overflow in case of the major floods contemplated and described.

4. That

"So considered, a reasonable construction of Section 4 of the Act of May 15, 1928 (33 U. S. C. A., Sec. 702-d), must regard such as the 'additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River,' for which the United States shall provide flowage rights (Section 4, Act May 15, 1928)."

The Court of Appeals in the Sponenbarger case quotes with approval from one of the briefs of counsel as follows:

"'The Government has deprived the Boeuf Basin landowners of property, to wit: Of certain of the attributes of their property rights in the land in the Boeuf Basin, by designing and constructing a levee system deliberately intended to sacrifice the Boeuf Basin lands for the benefit of a much larger group and for the public good and, among other things, has deprived the Boeuf River landowners of that particular attribute of their property which consisted of their common-law right to protect their lands against floods by raising and strengthening their protective levees and by giving the Government the right to sacrifice

the existing levees when necessary to accomplish the general purpose.' "

In the case of Hurley v. Kincaid, 285 U. S. 95, this Court said:

> "We may assume that, as charged, the mere adoption by Congress of the Plan of Floodway Control, which involves an intentional, additional, occasional flooding of complainant's land, constitutes a taking of it * * * as soon as the Government undertakes to carry out the contract authorized."

In the case of United States v. Yazoo etc. R. Co., 4 Fed. Supp. 366, decided by the District Court of Louisiana, Borah, District Judge, the condemnation proceedings were instituted under the same act. Commissioners were appointed and instructed as to their duties. They returned an award for more than one million dollars, to which the Government filed exceptions and objections. Arguments were heard on the exceptions and the case was submitted. Thereafter the Government, claiming to act pursuant to instructions from the Attorney-General and in compliance with the request of the Secretary of War, requested leave of Court to dismiss the proceedings. The respondent objected on the ground that there had been a taking. The Government conceded that if there was a taking there could be no dismissal. The situation there was exactly as it is in the case at bar with reference to a taking. The Government there desired the right to overflow a strip of land lying in the floodway. Judge Borah, in a very able opinion, held that there had been a complete taking in fact. In that case, as in the case at bar, there were gaps left for railroads and bridges, so that the project was substantially completed. The Court said:

> "The fact that the existing gaps have not been closed, and that the main levee between the spillway

and the river has not been cut, is of no material importance, considering the magnitude of the work. For all practical purposes the spillway is, and has been since June, 1931, complete and ready for operation whenever the need therefor shall arise. The United States has acquired and taken every right needed for the spillway project, and the property of the respondent has to all intents and purposes been subjected to every possible use contemplated by the taking.

"These facts show a taking within the principles of law applicable and give rise to compensation in favor of the respondent. Kincaid v. United States (D. C.), 37 Fed. (2d) 602 (Affirmed by the Court of Appeals, 49 Fed. [2d] 768)."

This case was appealed to the Court of Appeals, but was dismissed upon stipulation of the parties, 67 Fed. (2d) 1019, a settlement apparently having been effected. Certainly the Government would have no right to abandon the project after it once built the set-back levee. The rights of petitioner have been invaded. The west portion of his farm had been condemned and cut off. The remaining property, which is here involved, consisting of 1,033.56 acres, was subjected to the servitude of additional overflows, irrespective of whether the Government ever cut the Riverside Levee or not. Petitioner's property has to all intents and purposes been subjected to every possible use contemplated by the taking. The trial court refused to permit the Government engineers to answer a question, but we quote it because we think it aptly illustrates the situation (R. p. 196):

"Q. Mr. Miller, as an engineer, do you consider this all one project, I mean the spillway and set-back levee, one proposition or one project?"

Of course, as an engineer, he would consider it one project. Anyone would consider it as such, and this Court should consider it as one project. When the set-back levee was

built the Government appropriated the flowage rights on the land in question and became liable as of that time, and when we use the word "built" we mean "started." If such is not the law, then the Government can appropriate property, hold up condemnation proceedings for years without the payment of interest or the equivalent of the value of property as of the time of taking.

We call the Court's attention to the dissenting opinion of Judge Hamilton in Franklin v. U. S., 101 Fed. (2nd) 459, l. c. 464. Judge Hamilton gives the definition of a taking as follows, l. c. 465:

> "The transferring by a governmental agency or public utility into its own possession or keeping or appropriating or entering into the possession or use of another's property without his consent."

Judge Hamilton reviews a number of cases on the question of taking, both those holding that a taking occurred, and those holding that a taking did not occur, and distinguishes the same. We respectfully refer the Court to his dissenting opinion.

The Court will undoubtedly read both the majority opinion and the dissenting opinion since the Franklin case is now pending before this Honorable Court on certiorari.

It is noteworthy that in the passage of the Flood Control Act of May 15, 1928, Congress in Section 9 of the said act, provides that the provisions of Sections 13, 14, 16 and 17, of the River and Harbor Act of March 3, 1899, are made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this act.

Section 14 of the River and Harbor Act of March 3, 1899, provides:

> "That it shall not be lawful for any person or persons to take possession of or make use of for any pur-

pose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works; Provided, That the Secretary of War may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest."

The record in this case (R. p. 200) shows not only that the Government assumed control, but that after the flood of 1937, the Government rebuilt the riverside levee. This would bring the situation squarely within the purview of Section 14, and would subject the levee district or the individuals who undertook to interfere with the Riverside Levee to the penalties and legal proceedings provided for in Sections 16 and 17 of the said River and Harbor Act of March 3, 1899. How, then, can the Government reconcile its present position, wherein it claims that it has not taken control of the Riverside Levee with said Section 9 of the Flood Control Act, which incorporates the said provisions of the River and Harbor Act and expressly provides for noninterference with the levee. This was definitely the purpose of Congress in including within the scope of the Flood Control Act the said Sections 13, 14, 16 and 17 of the River and Harbor Act of March 3, 1899.

This Court held there was a taking in the case of Jacobs

v. U. S., 290 U. S. 13, where the Government constructed a dam and intermittently overflowed agricultural land in consequence of the construction. This Court held there was a taking in U. S. v. Lynah, 188 U. S. 445, where a rice plantation was affected as a result of improvements in navigation. The owner of certain real estate bordering on the Savannah River brought an action to recover against the Government in placing dams and other obstructions in the river in such a manner as to hinder its natural flow and to raise the water so as to overflow the land of plaintiff to such an extent as to cause a total destruction of its value and destroying the use of the same. There was no proceeding in condemnation instituted by the Government and no attempt to take and appropriate the title. The evidence showed that a large portion of the land flooded was in its natural condition between high water mark and low water mark and was subject to overflow as the water passed from one stage to another; that this natural overflow was stopped by an embankment, and in lieu thereof by means of floodgates the land was flooded and drained at the will of the owner. It was shown that by seepage and percolation through the embankment and an actual flowing upon the plantation above the structure, the water was raised in the plantation about eighteen inches, and that it was impossible to remove the water, so that the plantation was unfit for the cultivation of rice. Under these circumstances this Court said, l. c. 469:

> "Does this amount to a taking? The case of Pumpelly v. Green Bay Company, 13 Wall. 166, answers this question in the affirmative."

In the Pumpelly case a dam was constructed across the Fox River, by means of which the land of Pumpelly was overflowed and rendered useless. This Court quotes from the Pumpelly case, as follows:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the Government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

This Court further says, l. c. 470:

"It is clear from these authorities that where the government by the construction of a dam or other public work so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. * * * and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the government and it becomes henceforth the full owner."

This Court makes the distinction in the Lynah case be-

tween a rightful taking and a tortious act. It is this distinction that the Government has wholly failed to observe in taking its position in this case. Everything that was done in connection with this project was done pursuant to the Flood Control Act of May 15, 1928. This is not a case where the Government has tortiously damaged property or has damaged the same consequentially. The damage to this property has been done pursuant to a law passed by Congress. Upon the passage of the Flood Control Act the owners of property were forbidden to interfere with the riverside levee or to take any steps that would interfere with the project. In enacting into the Flood Control Act the provisions of Sections 13, 14, 16 and 17 of the Harbor Act of 1899, Congress had this very thing in mind. Nobody other than the Government, through its duly constituted agencies, has any right to interfere with the riverside levee or to raise the same, the effect of which would be to damage Cairo. If the Flood Control Act was not in effect, why did the Government condemn 105.34 acres along the western side of this farm? What right has the Government to divide the project? It is all one plan. The building of the set-back levee was part and parcel of the project in question, and if there was not a taking when the Flood Control Act was passed, there certainly was a complete taking of the easement in question when the Government started to build the set-back levee and cut off 105.34 acres from this petitioner's property.

In U. S. v. Cress, 243 U. S. 316, a lock and dam were constructed by the Government in a river whereby the level of the river was raised and land of the claimant was affected thereby. The Cress case is undoubtedly one of the leading cases. There this Court, in an opinion by Mr. Justice Pitney, held:

(1) That the facts amounted to a partial taking of the property;

(2) That the United States was liable ex contractu to compensate the owner to the extent of the injury;

(3) That, upon payment, the United States would acquire an easement to overflow the land as often as would necessarily result from the use of the lock and dam for navigation, the fee, however, remaining in the private owner;

(4) That the riparian owner also was entitled to compensation for impairment of the value of his land caused by the destruction of a ford over the tributary used in connection with a private way appurtenant to the land.

This Court, in the Cross case, referring to the making of improvements in navigable streams, said (l. c. 326):

> "But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment (citing cases)."

Furthermore, this Court in the Cress case distinguishes the cases which are relied upon by the Government, such as Gibson v. United States, 166 U. S. 269, where no water was thrown back on claimant's land, and the damage was confined to an interference with the access thence to the navigable portion of the river; Bedford v. United States, 192 U. S. 217, 225, where the damage to claimant's land resulted from operations conducted by the Government six miles farther up the river. The injury done to the claimant's land was an effect of natural causes. This Court, in the Bedford case, said (l. c. 225):

> "In the case at bar the damage was strictly consequential. It was the result of the action of the river through a course of years. The case at bar, therefore, is distinguishable from the Lynah case in the cause

and manner of the injury. In the Lynah case the works were constructed in the bed of the river, obstructed the natural flow of its water, and were held to have caused, as a direct consequence, the overflow of Lynah's plantation. In the case at bar the works were constructed along the banks of the river and their effect was to resist erosion of the banks by the waters of the river. There was no other interference with natural conditions."

In Jackson v. United States, 230 U. S. 1, 23, relied on by the Government, the owners of land on the east bank of the Mississippi River claimed compensation for a taking of their property by reason of the effect of levees built on the west bank opposite their lands as a part of a system of levees, designed to prevent crevasses, retain the water in the river, and thus to improve navigation. This Court held in the Jackson case that there was no direct invasion of the lands of the claimants. The damages were altogether consequential. In the Jackson case the state and local authorities continued to construct levees for protection. The Government had failed to construct additional levees along the Mississippi Valley, so as to afford protection from overflow. These levees combined with those levees constructed by state and federal authorities at other points.

This is a totally different situation from that in the case at bar, where the intention is to overflow when the river reaches a certain stage on the Cairo gauge, and where this very act is designed to overflow this petitioner's land and where everything that has been done up to the present time has been done pursuant to the act, and where the act contemplates compensation. See also the following cases: U. S. v. Grizzard, 219 U. S. 180; Hopkins v. Clemson College, 221 U. S. 636; Peabody v. U. S., 231 U. S. 530. The Government also strongly relies on the case of Matthews

v. U. S., 87 C. Cls. 662. This was a suit brought to recover something over a million dollars from the Government for a taking prior to the institution of the condemnation suit for an easement for flowage rights over 20,064.69 acres of land covered, for the most part, with approximately 158,228,000 feet of merchantable hardwood timber. It was contended the taking occurred May 15, 1928, which was the date of the passage of the Flood Control Act. There is a description set out in the case of the plan of the Flood Control Act between Birds Point at Cairo, Illinois, and New Madrid, Missouri, by the construction, between these points, of a second, or setback, levee several miles west of the present riverside levee, and it is shown that the plan contemplates the reduction in height of the riverside levee from a grade of fifty-eight to fifty-five feet on the Cairo gauge for a distance of about eleven miles south of Birds Point to be known as the upper fuse plug section. There was to be a corresponding reduction in a portion of the riverside levee for some distance at the south end of the floodway near New Madrid, Missouri. The Court indicates the purpose, which, as we have heretofore set out, was to permit the flood waters of the Mississippi River, when the flood stage of the river should exceed fifty-five feet on the Cairo gauge, to flow over the riverside levee just south of Birds Point and into the floodway, and to spread out over this floodway territory, and to flow slowly toward the south end thereof near New Madrid, Missouri, and, when the flood stage of the river has sufficiently subsided, to permit these flood waters and backwater in the southern portion of the floodway to flow back into the river channel through the lower fuse plug section and St. John's Bayou in the lower end of the floodway near New Madrid. The Court in its decision was strongly influenced by the fact that the land in the Matthews case had a **very low elevation.**

A reference to the opinion, 87 C. Cls. 686, 687, shows that of 20,088 acres, 19,849.8 acres, or 98.8 per cent, was below an elevation of 300. The Court in the Matthews case, l. c. 715, expressly holds that about **99 per cent** of this land has always been subject to overflow to a depth of eighteen feet by backwater and surface drainage water when the water of the Mississippi River has reached a stage of fifty-five feet on the Cairo gauge. The Court further held that if the riverside levee was high enough and strong enough to afford complete protection against overtopping and crevassing at fifty-eight feet on the Cairo gauge, 100 per cent of plaintiff's land would be overflowed by backwater at a stage of fifty-eight feet. The Court expressly finds that the record does not establish that any additional headwater flowing over the Matthews land by reason of the cutting down or reduction by the defendant of a section of the riverside levee near Bird's Point to a grade equivalent to fifty-five feet on the Cairo gauge will injure, damage or place upon plaintiff's timber or land a substantial burden or servitude to any greater extent than the timber and land have heretofore suffered, and expressly found (l. c. 716) that the plaintiff would not actually be deprived of any valuable property rights which he had theretofore enjoyed and possessed in the land and timber. While the Court in the Matthews case uses some loose language (l. c. 720, 721), which, on the surface, might appear to give the Government some comfort, a careful reading of the opinion will show that the Court definitely based its opinion upon the fact that the plaintiff in the Matthews case was not damaged. Besides, the language in the Matthews case (l. c. 720, 721), in so far as it militates against our position is in conflict with the decisions of this Court and other courts, which we have heretofore adverted to under the question of "taking."

In the case of U. S. et al. v. Kincaid, 49 F. (2nd) 768

(C. C. A. 5), the Court of Appeals for the Fifth Circuit affirmed a decision of the trial court as set out in 35 Fed. (2nd) 235 and 37 Fed. (2nd) 602. The Supreme Court in the Hurley case, cited supra, reversed the Kincaid case, but not on the ground that there was no taking, but on the simple ground that the owner had a remedy at law, and that it was not necessary to enjoin the proceedings. In the Kincaid case it was expressly held that the Flood Control Act of May 15, 1928, required the United States to provide flowage rights for additional destructive flood waters passing by reason of diversions from the main channel (35 Fed. [2nd] 235), and further held (37 Fed. [2nd] 602) that the appropriation of the flowage rights by the Government is complete with the construction of the work designed to direct waters on the land, and is not postponed until the lands are actually occupied by the diverted waters. In this connection the Court said, l. c. 608:

> "Of course, the physical occupancy of the ground in this case will not take place until and when it is overflowed by water in time of flood; but the process of subjecting it to the service and the taking possession, in so far as is either necessary or contemplated by the act, will begin with the construction of the **first levee or works** which are intended to direct the water upon the land * * *." (Emphasis ours.)

The Court further says:

> "Under the law of this state, unqualified ownership of property includes the usus, fructus, abusus, or the right to possess, enjoy the fruits, and dispose of the whole in the most unrestricted manner. * * * When either of these is taken away or diminished, to that extent does the owner lose a part of his property, or, which is the same, the elements that constitute ownership."

The eminent authority, Lewis, on Eminent Domain, Vol. I, paragraph 65, states the rule as follows:

"Principles which determine when there has been a taking. If property, then, consist, not in tangible things themselves, but in certain rights in and pertinent to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and, hence, that his property may be taken in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of the property itself, that, whenever the rights of an individual to the possession, use, or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, pro tanto, taken, and he is entitled to compensation." Citing cases, including Nahant v. United States, 136 Fed. 273, 69 L. R. A. 723.

Lewis further says (page 56, paragraph 65):

"Any substantial interference with private property which destroys or restrains its value or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed is in fact and in law a taking in the constitutional sense to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed.

"It will thus be seen that in order that there may be a recovery of compensation for damages to property, no part of which is taken, such damages must be the result of violation of some one or more of the rights which constitute profits. In other words, the damage must be actionable damages, that is, damages which would be remediable if done by an individual without any pretense of constitutional authority."

The Fifth Amendment to the Federal Constitution, among other things, provides:

"Nor shall private property be taken for public use without just compensation."

To be a taking there must be property.

In Buchanan v. Warley, 245 U. S. 70, the Supreme Court said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land."

To the same effect is In re Crook, 219 Fed. 979.

In 20 C. J. 566, the doctrine is stated by the text-writer as follows:

> "There need not be an actual physical taking, but any destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a taking for which compensation must be made to the owner of the property."

The Jadwin plan contemplated the practical taking over of the Riverside Levee by the Government and the undisputed evidence shows that the Government asserted complete dominion over it. The program of the levee district for raising the levee was halted. Without going into details of the plan, it is obvious that appellant's free use and enjoyment of his lands and the property herein involved were materially interfered with from the time the work began, if not before. If at any time he wished to sell or dispose of the land, he could only do so subject to the easement of the Government and at a reduced price. The se-

curity of his land was materially reduced as soon as the work started. His right to have the levee stand intact, or to be raised and improved as a protection to his land, disappeared.

Would the Government permit any levee district or any group of individuals or any person to build the Riverside Levee up to sixty-five feet, which would be a complete protection to the land of this petitioner and others situated in the floodway area? Would not the Government immediately invoke the applicable provisions of the River and Harbor Act of 1899, which we have heretofore adverted to? See also the case of Shoshone Tribe v. United States, 299 U. S. 476, which the Court of Appeals cites in its original opinion in support of its view that there was a taking as of October 21, 1929.

In the case of United States v. C. B. & Q. R. Co., 82 Fed. (2nd) 131, Judge Faris rendered an opinion and very briefly discussed the question of interest. Judge Faris there said, l. c. 134:

> "As a foreword, it may be premised that, if well-nigh the unanimous voice of stare decisis shall be heeded, appellee had the right to build its railroad along the bank of the Mississippi, even though a navigable stream, and that in so doing it had the legal right to rely upon the continued maintenance of the natural level, width and flow thereof. And that the right to increase artificially this level, width and flow (to the hurt of appellee), beyond that provided by nature could be obtained by appellant only by the exercise of the sovereign right of eminent domain, and the payment to appellee of just compensation for the damages by it sustained. United States v. Lynah, 188 U. S. 445, 23 S. Ct. 349, 37 L. Ed. 539; United States v. Cress, 243 U. S. 316, 37 S. Ct. 380, 61 L. Ed. 746; Jacobs v. United States (C. C. A.), 45 F. (2d) 34; United States v. Wheeler Township (C. C. A.), 66 Fed. (2d) 977."

Further in the opinion Judge Faris makes the distinction we have made above in connection with the cases cited by the Government in the Government's motion for rehearing in the Court of Appeals, wherein the Government cites such cases as Jackson v. United States, 230 U. S., page 1, and other cases cited on page 138 in the C. B. & Q. case. Those were actions under the Tucker Act. In each of them the Court held that the damages arising were consequential and not proximate. In none of them was there any physical taking of any part of the plaintiffs' land. Judge Faris, on page 139 of the C. B. & Q. opinion, states that:

> "To the word 'taking' there has now been added by almost unanimous decision, bottomed on changes in the organic law, or by statutes, or by judicial interpretation in the latter cases, the words 'or damaged,'"

and he says that the Supreme Court of the United States has conceded in such cases as Jacobs v. United States, 290 U. S. 13, that just compensation means all of one's damages.

The case of the United States v. C. B. & Q. R. Co., 90 Fed. (2d), page 161, a decision by the Seventh Circuit, refers to and approves the rule as laid down by Judge Faris in the C. B. & Q. case, cited supra, and the Court goes into the question of consequential damages, proximate damages, etc., and holds that riparian owners have the right to erect and maintain their property in reliance upon natural levels, widths and flows of navigable streams, and that, while the Government may increase the burden of natural servitude, it may not do so without just compensation.

It follows, therefore, that the building of the set-back levee constituted a carrying out of the Floodway Act of 1928, and it follows that the Government took the ease-

ment in question as soon as it started to construct the set-back levee, if not upon the passage of the Flood Control Act itself. We think there is an interesting question raised as to how far the Government could go to prevent interference with the Riverside Levee upon the passage of the Floodway Act of May 15, 1928, particularly in view of the fact that under paragraph 9 thereof it included in its scope and operation those sections of the River and Harbor Act which we have heretofore adverted to. To be frank with the Court, we would be inclined to recognize the right of Congress to repeal the Act of May 15, 1928, prior to the time that anything was begun pursuant to the act, but we are equally convinced that as soon as work started under the act there was a taking of the easement in question and the obligation on the part of the Government to compensate the owner of such property. The Court of Appeals for the Eighth Circuit in the Spanenbarger case held that the time of the filing of the condemnation suit is immaterial. This is undoubtedly correct. Could the petitioner have sold this tract of land, No. 243, free and clear of the servitude imposed by the Floodway Act of 1928 at any time after the Government began construction of the set-back levee? It is obvious that anybody buying the land would buy it subject to that servitude. Therefore, there must have been a taking within the definition set out above by the numerous authorities cited and quoted from.

B.

ON THE QUESTION OF THE JURISDICTION OF THE TRIAL COURT TO HEAR THE CLAIM OR ENTER JUDGMENT FOR THE AMOUNT AGREED UPON BY THE GOVERNMENT AND THIS PETITIONER AS THE EXTENT OF DAMAGES OR AS THE VALUE OF THE FLOWAGE RIGHTS.

1.

"When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter."

This language is quoted from the case of U. S. v. Thekla, 266 U. S. 328, l. c. 339, 340. This Court further gave as the reason for its rule, l. c. 341, that:

> "the reasons are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest. As has been said in other cases, the question of damages to the colliding vessel necessarily arose, and it is reasonable for the Court to proceed to the determination of all the questions legitimately involved, even when it results in a judgment for damages against the United States. The Nuestra Senora de Regla, 108 U. S. 92; The Paquete Habana, 189 U. S. 453, 465, 466. We gather that our conclusion accords with the opinion of the English courts. (Citing cases.) * * * It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act."

In The Nuestra Senora de Regla, 108 U. S. 92, this

Court held that when the Government brings a proceeding in one of its own courts that it is bound by the submission, and it is the duty of the Court to proceed to the final determination of all of the questions legitimately involved.

In The Paquete Habana, 189 U. S. 453, this Court held that where the United States files a proceeding in court that an affirmative decree may be rendered against the United States in the said proceeding.

To the same effect are United States v. Wilkins, 6 Wheat. 135; Gratiot v. U. S., 15 Pet. 336; U. S. v. Bank of Metropolis, 15 Pet. 377; Bull v. U. S., 295 U. S. 247.

In the case of The Gloria, 286 Fed. 188, many of the authorities are reviewed, and the Court comes to the conclusion, l. c. 193, that the

> "sovereign state, generally speaking, is not obliged to go into court; but, if it seeks the assistance of the court, it would seem to be in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction of the court in respect of any set-off or counterclaim properly assertable as a defense in a similar suit between private litigants. * * * It would seem inconsistent with the duty of a court of general jurisdiction to do complete justice for the court not to determine the whole nature and extent of the counterclaim, even though it involved incidentally a determination that a sovereign state was indebted or obligated to the defendant. * * *"

(l. c. 194)

> "There is no principle of public law exempting a sovereign state from its obligations under the law."

And it was therefore held that the defendant had a right to file a counterclaim setting up that the plaintiff, the Kingdom of Norway, had failed to perform its contract for the purchase of 4,500 tons of sugar.

In U. S. v. Stephanidis, 41 Fed. (2) 958, affirmed 47 Fed. (2) 554 (C. C. A. 2nd), the United States brought a suit for the purchase of a steamship, **Kilpatrick**. There was a counterclaim filed for breach of warranty. On motion to dismiss the counterclaim the Court refused to do so, holding that the Court had a right to have all of the rights of the parties determined in the case.

In The Barbara Cates, 17 Fed. Supp. 241, the Court, in considering the question of whether a counterclaim would lie against the United States, said (l. c. 244):

> "I am satisfied that under the principles of The Thekla, 266 U. S. 328, 45 S. Ct. 112, 69 L. Ed. 313, the counterclaim or cross action could be maintained either at law or in admiralty."

The Court distinguishes the case of Nassau Smelting & Refining Co. v. U. S., 266 U. S. 101, which is the case relied on by the Government in the instant case, on the ground that the Nassau Smelting & Refining Co. Works case was based upon the Dent Act (50 U. S. C. A., Sec. 80, note), under which Congress had confined jurisdiction to the Court of Claims exclusively. The Court further said:

> **"There is nothing to limit the broad principles of The Thekla to admiralty cases only."** (Emphasis ours.)

In United States v. National City Bank of New York, 83 Fed. (2nd) 236, the rule is laid down that in equity, inconvenience will not be allowed to accomplish injustice by preventing set-off, where it appears that defendant has no adequate means for recovery in a separate action. It is also held that where a sovereign brings a suit he is obliged to submit to jurisdiction of the Court in regard to a set-off or counterclaim properly assertable as a de-

fense in a similar suit between private litigants, and claims arising out of the same transaction may be set off against the sovereign. The same transaction within this rule does not necessarily mean occurring at the same time, but may comprehend a series of many occurrences, depending upon their logical relationship. In this case the United States sued as assignee. The Court cites some of the cases we have cited above, and holds (l. c. 238):

> "The Supreme Court has held, independently of any statute, that, where the sovereign brings a suit, it submits to the application of the same principles which govern private suitors (citing cases)."

The Court, after citing the Gloria case, supra, and the case of French Republic v. Inland Nav. Co., 263 Fed. 410, states:

> "Where a sovereign voluntarily litigates, he must play the role of a litigant like any other suitor and abide by the consequences."

The question of the validity of a similar contract has recently come before the United States Circuit Court of Appeals for the Fourth Circuit in the case of Wachovia Bank & Trust Co., Guardian, and J. Harper Erwin, Appellants, v. United States of America, Appellee, decided August 26, 1938, 98 Fed. (2nd) 609 (C. C. A. 4). In this case the shoe was on the other foot. The Government desired to enforce a contract that it had made to purchase certain land at $8.50 an acre. On March 18, 1935, the Government secured an option providing that at any time within twelve months from the date of the same, if requested to do so by the Secretary of Agriculture, the owners would sell the land in question at $8.50 an acre; that in case the vendors were unable to show an established title satisfactory to the Attorney-General, the Government would, if it saw fit, institute proceedings for the condemnation of the said

land. The option also provided that, pending the vesting of title, the United States, if it elected to do so, should, upon acceptance of the option, use or occupy and administer any or all of the lands in question. There was a minor involved in the case and it was provided that an order of Court be obtained approving the option. Twelve days later the Department of Agriculture wrote the Wachovia Bank & Trust Co., guardian, that the Department had elected to purchase the land under the option. There was some difficulty in clearing the title and it was agreed to institute condemnation proceedings. After the report of the appraisers, the cause came on to be heard before the court below on October 13, 1937, at which time the Court entered its judgment of condemnation. There were two questions involved in the case: First, whether the guardian was bound by the option after the expiration of the twelve-months period fixed in the option, although accepted within that period. Second, whether in the condemnation suit the value of the tract of land was limited by the price fixed in the option. The United States Circuit Court of Appeals for the Fourth Circuit held the condemnation proceedings would take some time, and therefore the acceptance of the option within one year contemplated that the proceedings might require more than a year to complete. The Court also decided that the respondents, that is, the landowners, **did not** have a right to show that the value at the time of the appraisement was greater than the price of $8.50 fixed in the option, and held that the **Court did not err in refusing to hear evidence tending to prove values.** The Court further held that upon the acceptance of the option it became converted into a bilateral contract binding upon the parties, and that the vendors were bound by the price per acre fixed in the option. The Court further held that the agreement provided that the price was fixed, even in the event of condemnation, and that condemnation proceedings were con-

templated in the option. The Court further held that **parties to the option are bound by the price fixed in the option**; that while one not a party to the option is not bound by the option price in condemnation proceedings where appraisers fix the price, the parties to the option are bound, and the judgment of the trial court fixing the amount at the option price was affirmed.

Thus the Court will see that this case is squarely in point with the case at bar, wherein the Government and Danforth agreed upon the extent of the damages, and agreed in the said offer and acceptance that condemnation proceedings might be instituted, with the request that an agreed verdict be had in the amount of the offer, because payment could not be made without Court action, as title could not be cleared. This is not a case of fraud or irregularity. Everything done in connection with the offer made was done by the Government through its duly authorized agent. It was duly accepted. It became a binding contract. The only thing necessary left to be done was to clear the title. We submit that what is sauce for the goose is sauce for the gander. Was the landowner bound by contract? If he was, so is the Government bound. For this great Government to appear in the Fourth Circuit, insisting upon the validity of a similar contract fixing the price and prevailing, and then coming before this high Court and repudiating its contract and refusing to recognize its contract price, is flaunting too much in the face of the adage, "Consistency, thou art a jewel."

The Fifth Amendment to the Constitution of the United States provides, among other things, that "no person is to be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

Will anybody question the assertion that the rights under a valid contract are property within the meaning of this amendment? Since it is property, is not the peti-

tioner deprived of his property without due process, where he is denied a proper remedy, to enforce a recognized right although in the same proceeding his property is taken? If the position of the Government is correct, there is a clash in the constitutional rights of the sovereign government and of the individual person. It would not do to argue that because the contractual rights of the petitioner are affected that the sovereign government would not have a right to bring a condemnation suit. Nor would it do to argue, as the Government has heretofore contended, that whatever rights the petitioner has under the contract he must enforce in a Court of Claims. If he is relegated to the Court of Claims, would it not affect the right of the Government to bring a condemnation proceeding until the petitioner's rights are determined in a Court of Claims, or would it be in order to have two suits pending, one in a Court of Claims and one a condemnation suit? This argument is particularly strengthened where the rights of third persons are affected, as is usually the case when a condemnation suit is brought. There are usually other interests involved. It so happens that in the case at bar the petitioner paid off a mortgage of some $50,000.00, so that he is the only person involved here, but such is not ordinarily the case. Is it not a far more equitable and logical procedure to have the rights of the parties determined in the one suit where the rights of both the sovereign and the individual can be determined? Does not such orderly procedure obviate minimizing the right of the sovereign to condemn property under its power of eminent domain? The Government admits the validity of the contract in question and claims that the Government could have enforced the contract in the condemnation suit, but contends that the petitioner has not the reciprocal right of so doing. We are not seeking in this action to recover anything against the Government. We are only seeking com-

pensation for the damages sustained by reason of the taking. The amount of the damages or the value of the easement in question was fixed by the parties **at the request of the Government itself.** The Government can only condemn property upon the payment of just compensation. The petitioner is not questioning the right of the Government to condemn. In the case at bar there was no occasion for the Court to pass upon the damages or to appoint commissioners, since the parties themselves agreed upon "just compensation." The Court will note that the Government pleads in its petition (R. p. 9), "That the plaintiff herein and the defendants, and each of them, as owners, claimants and lessees of the property hereinbefore described have been unable to agree upon the compensation, to which said owners, claimants and lessees would be entitled for the use to which the said premises hereinbefore described would be subjected or to amicably settle upon such compensation, and that it is necessary to proceed by condemnation, as by law provided, to acquire the interest sought to be acquired by these proceedings."

The undisputed testimony shows that the contrary was the case, and but for the fact that the Government desired to clear the title, as set out in its offer, it would have had no occasion to proceed with the condemnation proceedings, on the theory that it was unable to agree with the landowner. In fact, the issue in failing to agree, as set out in the Government's petition, was contradicted by the evidence as offered by the Government (R. pp. 108, 109). Even in the absence of an answer or counterclaim or any other pleading, the landowner would be entitled to prove his damages and the contract in question would have been admissible and binding upon the parties. Chicago v. Chicago R. R., 166 U. S. 226; Springfield etc. Ry. Co. v. Calkins, 90 Mo. 538, 3 S. W. 82; Mo. Power & Light Co. v. Creed, 32 S. W. (2nd) 783.

The Court should remember that the offer came voluntarily from the Government after a thorough investigation, after three separate appraisals, as we have heretofore shown. Therefore this case comes squarely within the purview of that line of cases including those of this Court, which we have heretofore cited, some of which we have quoted from, holding that where the Government voluntarily comes into court the Court has jurisdiction to litigate all of the rights of the parties growing out of the transaction or subject matter involved and to do complete justice between the parties in the matter. The rule we contend for has been greatly liberalized in recent years, and this Court has broadened the rule in such cases as Bull v. U. S., 295 U. S. 247. This is not a case where the petitioner had a separate transaction with the Government, that it is now seeking to enforce in this suit. It is a situation where the parties by contract fixed the damages or agreed upon the value of the flowage rights. The Government admits the contract is valid and binding. The Court of Appeals found it to be so. It is true that if the Government had not brought condemnation proceedings, that it might have been necessary for the petitioner to have filed a claim in the Court of Claims. Then the Government would have contended that the damages could not be ascertained until the condemnation proceedings were finally completed and determined, showing that the compensation or damages fixed by contract was part and parcel of the transaction, and that all of the proceedings were one transaction. Now, having voluntarily come into court, and having pleaded that the parties could not agree upon the damages, the United States created the issue by its pleading and by its appearance in court, and gave this petitioner the right to have all of his rights determined in this case, since the petitioner's right to compensation is an integral issue in the condemnation suit. Therefore, the

cases cited and relied on by the Government, which hold that parties can only sue the Government under some statute authorizing it, are wholly without application. The Government's position has heretofore been and doubtless will be in this court, that the rule we contend for, only applies in admiralty cases. So far as we know, this Court has never in any decision limited the rule to admiralty cases. On the contrary, in the case of Paquette Habana, 189 U. S. 453, the proceeding is one at law, and this Court held that the **procedure should conform to the state law.** Common justice and equity (admitted by the Government in the Court of Appeals) demands and requires that all of the rights of the parties be determined in this suit.

CONCLUSION.

Taking.

The Government to all intents and purposes has taken the property in question, that is, has taken the easement involved within the definition of "a taking." The cases upon which the Government has been relying and which it doubtless will cite to this Court are without application. We have endeavored to point out some of these cases. The Government will have an opportunity of attempting to distinguish the cases that we have cited and quoted from. We believe it will be impossible for the Government to distinguish the recent cases on the question of taking that we have heretofore set out and discussed, and we further believe that it will be impossible for the Government to show that the facts in this case do not bring the situation squarely within the purview of the definition of taking as set out by the recognized authorities. If we are correct in our conclusion, then this petitioner is entitled to interest from the date of taking. We do not believe that this Court should fix the date of taking at any later date than

the date when work was started on the set-back levee, namely, October 21, 1929.

Enforcement of Contract.

We submit that there is absolutely no valid or legal reason why the Court should not enforce the contract in question and enter up a judgment in the sum of $31,681.98, together with interest from the time of taking. The record, page 187, shows that the petitioner paid off a mortgage of something over $50,000, based upon a loan of approximately $50 an acre. We know that immediately prior to the enactment of the Floodway Act the insurance companies were making loans of approximately $50 an acre in the area where this land was taken. Following the enactment of the Floodway Act, they refused to make any loans on property in the Spillway area. We think the Court will take some notice of the fact that insurance companies require some substantial margin of safety before they make loans on property. Presumably insurance companies would not lend more than 50 per cent or at the most two-thirds of the value of the property. If we assume, for the sake of argument, that $50,000 represents two-thirds of the value of the property, we have a piece of property worth at least $75,000. The Government itself, through the proclamation of President Coolidge, recognized that the damage will be at least 66 per cent. On this basis the damage would be $49,500. If the damage is based on two-thirds of the assessed value, the record shows that the figure offered by the Government of $31,681.98 is within the amount authorized. Therefore, from any angle, whether it be legal or equitable or as a matter of fairness, the petitioner is entitled to have his contract enforced. The contract in question is the yardstick or measure of damages. The Secretary of War, through his duly author-

ized representative, came to petitioner and made the offer, which was accepted. It was lawfully made in accordance with the authority that the Secretary of War had and in accordance with the proclamation issued by President Coolidge. Did the Government have the right at the trial to come in and tell this taxpayer that while he was paying taxes on the basis of the assessed value and while he paid interest on the mortgage in excess of $50,000 that the Government could and would repudiate its contract and compel him to accept the Government's wholly inadequate offer of $16,868.80 (R. p. 147) or else?

We call the Court's attention to the fact that the appraisal made by the Department of Agriculture was made in 1931, three years after the Floodway Act went into effect, and long after the work had started in October, 1929. Can any fair-minded person, reading this record, conscientiously say that this land that readily carried a $50,000 loan prior to the project was not damaged, at least to the extent of the settlement price of $31,681.98?

We submit that the principles as laid down in the Wachovia Bank & Trust Co. case, supra, and other cases cited, governing contracts of the Government with landowners, are controlling here; that this contract, solemnly entered into by the Government, after full and careful consideration, and at the Government's request, should be enforced. Both reason and logic and equity, as well as legal principles, call for its enforcement in this action. We, therefore, respectfully ask the Court to reverse the case, with instructions to have a judgment entered up in favor of the plaintiff for the easement in question and for a judgment in favor of the defendant in the sum of $31,681.98, together with interest from the time of taking, namely, October 21, 1929, or, if this Court believes the time of taking is the time of completion, or substantial completion, of

the levee, October 31, 1932, then that the interest be added from the latter date.

Respectfully submitted,

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APPENDIX.

The Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534 (U. S. C., Title 33, Sec. 702a *et seq.*), provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: *Provided,* That a board to consist of the Chief of Engineers, the president of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate, whose compensation shall be fixed by the President and be paid out of the appropriations made to carry on this project, is hereby created; and such board is authorized and directed to consider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and after such study and such further surveys as may be necessary, to recommend to the President such action as it may deem necessary to be taken in respect to such engineering differences and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinbefore provided. Such project

and the changes therein, if any, shall be executed in accordance with the provisions of section 8 of this Act. Such surveys shall be made between Baton Rouge, Louisiana, and Cape Girardeau, Missouri, as the board may deem necessary to enable it to ascertain and determine the best method of securing flood relief in addition to levees, before any flood-control works other than levees and revetments are undertaken on that portion of the river: *Provided*, That all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: *Provided further*, That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river. The sum of $325,000,000 is hereby authorized to be appropriated for this purpose.

All unexpended balances of appropriations heretofore made for prosecuting work of flood control on the Mississippi River in accordance with the provisions of the Flood Control Acts approved March 1, 1917, and March 4, 1923, are hereby made available for expenditure under the provisions of this Act, except section 13.

SEC. 2. That it is hereby declared to be the sense of Congress that the principle of local contribution toward the cost of flood-control work, which has been incorporated in all previous national legislation on the subject, is sound, as recognizing the special interest of the local population in its own protection, and as a means of preventing inordinate requests for unjustified items of work having no material national interest. As a full compliance with this principle in view of the great expenditure estimated at approximately $292,000,000, heretofore made by the local interests in the alluvial

valley of the Mississippi River for protection against the floods of that river; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required.

Sec. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks

of the river; it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

Sec. 4. The United States shall provide flowage rights for additional-destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: *Provided*, That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights-of-way which, in the opinions of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right-of-way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right-of-way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights-of-way required for this project. The provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights-of-way needed for works of flood control: *Provided*, That any land acquired under the provisions of this section shall be turned over without cost to the ownership of States or local interests.

* * * * * * *

Sec. 8. The project herein authorized shall be prosecuted by the Mississippi River Commission under the

direction of the Secretary of War and supervision of the Chief of Engineers and subject to the provisions of this Act. It shall perform such functions and through such agencies as they shall designate after consultation and discussion with the president of the commission. For all other purposes the existing laws governing the constitution and activities of the commission shall remain unchanged. The commission shall make inspection trips of such frequency and duration as will enable it to acquire first-hand information as to conditions and problems germane to the matter of flood control within the area of its jurisdiction; and on such trips of inspection ample opportunity for hearings and suggestions shall be afforded persons affected by or interested in such problems. The president of the commission shall be the executive officer thereof and shall have the qualifications now prescribed by law for the Assistant Chief of Engineers, shall have the title brigadier general, Corps of Engineers, and shall have the rank, pay, and allowances of a brigadier general while actually assigned to such duty: *Provided*, That the present incumbent of the office may be appointed a brigadier general of the Army, retired, and shall be eligible for the position of president of the commission if recalled to active service by the President under the provisions of existing law.

The salary of the president of the Mississippi River Commission shall hereafter be $10,000 per annum, and the salary of the other members of the commission shall hereafter be $7,500 per annum. The official salary of any officer of the United States Army or other branch of the Government appointed or employed under this Act shall be deducted from the amount of salary or compensation provided by, or which shall be fixed under, the terms of this Act.

Sec. 9. The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act.